

No. 15, 178

IN THE

United States Court of Appeals
For the Ninth Circuit

ONG WAY JONG, alias JOHNNY ONG,	}
<i>Appellant,</i>	
VS.	
UNITED STATES OF AMERICA,	}
<i>Appellee.</i>	

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

The brief of the appellee sets forth, insofar as argument is concerned, nothing but the *ipse dixit* of counsel for the Government. This is particularly true as to the first contention of appellant, which is discussed in the Brief of Appellee, to wit, that the trial Court committed error in admitting in evidence a vast mass of testimony consisting of conversations between the Government Agent Wu and Wee Zee Yep, the co-defendant of appellant, together with acts of the co-defendant and the agent, out of the presence of the defendant.

THE GOVERNMENT IGNORES THE DECISIONS OF THE
SUPREME COURT OF THE UNITED STATES AND OTHER
FEDERAL COURTS WHICH HOLD THAT A CONSPIRACY
CANNOT BE ESTABLISHED BY HEARSAY.

All of this evidence was admitted without any preliminary proof either of the existence of a conspiracy or of the connection of appellant therewith. Thus the most elementary principle of evidence, which excludes hearsay and *res inter alia acta*, was violated.

It should not be, but apparently it is, necessary to state that the mere fact that the defendant is charged with conspiring with another person to commit a crime does not open the flood gates which the sages of the law and the learned judge have erected against hearsay.

The rule is of course clear that where two or more persons enter into a conspiracy, the acts and declarations of one in furtherance of the conspiracy are binding upon his co-conspirators.

But it is only those acts in furtherance of the conspiracy which are binding upon those to whom the Government seeks to impute the words and deeds of another. The rule has never been better stated than in the opinion of Presiding Justice Cooper in *People v. Schmitz*, 7 Cal. App. 330, 94 Pac. 407:

“It is the policy of the law to exclude hearsay evidence with certain exceptions, well known to the profession. A defendant has the right to be confronted with the witnesses against him as to any act, matter or thing done or said by him, tending to connect him with the commission of an offense. His admissions, if he has made any, may

be received against him. His conduct and acts in many cases are admissible. If he has entered into a conspiracy the declaration of a co-conspirator during the continuance of the conspiracy and in furtherance of the common design is admissible in evidence. But the sages of the law and the learned judges have established the rule that the independent acts and declarations of one man shall not be evidence against another. It is sufficient for everyone to answer for his own sins, and not for the sins of his neighbor. The rule is thus laid down in our Code of Civil Procedure, section 1845: 'A witness can testify to those facts only which he knows of his own knowledge; that is, which are derived from his own perceptions, except in those few express cases in which his opinions or inferences, or the declarations of others, are admissible.' Section 1870 declares:

'Evidence may be given upon a trial of the following facts:

1. The precise fact in dispute.
2. The acts, declarations, or admissions of a party, as evidence against such party.
3. An act or declaration of another in the presence and within the observation of a party, and his conduct in relation thereto . . .
6. After proof of a conspiracy the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy.'

The evidence admitted does not come within any of the exceptions to the rule. . . . It is the rule well established that the admission of hearsay evidence that is injurious to a defendant is ground

for reversal. (People v. Griffin, 52 Cal. 616; People v. Gonzales, 71 Cal. 569 [12 Pac. 783]; People v. Hall, 94 Cal. 595 [30 Pac. 7]; People v. Hill, 123 Cal. 571, [56 Pac. 443]; People v. Landis, 139 Cal. 426 [73 Pac. 153].)''

The California statute quoted in the opinion of the learned Presiding Justice in the *Schmitz* case is but a statutory enactment of the well established and time honored rules of evidence. Indeed, the rules of evidence pronounced in the fourth part of the California Code of Civil Procedure are, for the most part, and with certain exceptions of which this is not one, a statutory enactment of the first volume of *Greenleaf On Evidence*. The same rule has been followed by the Supreme Court of the United States in *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L. Ed. 680, from which we quoted in appellant's opening brief:

"Such declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy. *Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence.*"

Also in appellant's opening brief, commencing at page 56, we cited with quotation the majority opinion of the high Court, written by Mr. Justice Black in *Krulewitch v. United States*, 336 U.S. 440, 69 S. Ct. 716, 93 L. Ed. 790, in which the conviction was reversed for the admission in evidence of a conversation between the prosecutrix and a woman who was an al-

leged co-conspirator with the defendant, in violating the so-called Mann Act:

“It is beyond doubt that the central aim of the alleged conspiracy—transportation of the complaining witness to Florida for prostitution—had either never existed or had long since ended in success or failure when and if the alleged co-conspirator made the statement attributed to her. Cf. *Lew Moy v. United States* (CCA 8th) 237 Fed. 50. The statement plainly implied that petitioner was guilty of the crime for which he was on trial. It was made in petitioner’s absence and the Government made no effort whatever to show that it was made with his authority. The testimony thus stands as an unsworn, out-of-court declaration of petitioner’s guilt. This hearsay declaration, attributed to a co-conspirator, was not made pursuant to and in furtherance of objectives of the conspiracy charged in the indictment, because, if made, it was after those objectives either had failed or had been achieved. Under these circumstances, the hearsay declaration attributed to the alleged co-conspirator was not admissible on the theory that it was made in furtherance of the alleged criminal transportation undertaking. *Fiswick v. United States*, 329 U.S. 211, 216, 217, 91 L. Ed. 196, 200, 201, 67 S. Ct. 224; *Brown v. United States*, 150 U.S. 93, 98, 99, 37 L. Ed. 1010, 1013, 14 S. Ct. 37; *Graham v. United States* (CCA 8th Okla.) 15 Fed. 2d 740, 743.”

In *Fiswick v. United States*, 329 U.S. 211, 67 S. Ct. 224, 91 L. Ed. 196, it is held (syllabus 1. (367) that a “confession or admission by one co-conspirator after he was apprehended was not in furtherance

of the conspiracy to deceive the Government, but had the effect of terminating the conspiracy, so far as he was concerned, and made his admissions inadmissible against his erstwhile fellow-conspirators.”

These decisions of the Supreme Court of the United States are, we think, sufficiently high authority to render it unnecessary to discuss decisions of the various circuit Courts of appeals, including that of this Court in *Dolan v. United States*, 123 Fed. 52, in which it was held that declarations tending to show the existence of a conspiracy between the person making them and the person to whom they were made were inadmissible against a third person not shown to have been connected with the alleged conspiracy. Once again, however, we direct the attention of the Court to the extremely learned and comprehensive opinion in *Minner v. United States*, 57 Fed. 2d 506. It is true, as stated by counsel for the Government, that proof of a conspiracy must in many cases be made with but circumstantial evidence. It is not necessary to offer direct evidence that the conspirators sat down together, specifically entered into an agreement to commit a crime, and worked out the details by which the same would be committed. The character of the circumstantial evidence which will justify a finding that a conspiracy existed is not very accurately stated, however, by counsel for the Government, who say at page 10 of the Brief for Appellee:

“A common design is the essence of the charge, and such design may be made to appear when the defendants and co-conspirators steadily pursue

the same object whether acting separately or together by common or different means, all leading to the same unlawful result. If it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same so as to complete it, with a view to the attainment of that same object the trier of the fact is justified in the conclusion that such persons were engaged in a conspiracy.”

In the first place, the definition ignores the all-important fact that the object of the defendants must be an unlawful object—and under the plain terms of the Conspiracy Statute, that object must be either to commit a crime against the United States or to defraud the United States (U.S.C.A. Title 18, Section 371).

Indeed, it is the pronouncement of a legal platitude to say that any crime may be proven by circumstantial evidence, provided, of course, that it convinces the jury of the guilt of the defendant to a moral certainty and beyond all reasonable doubt, and, further, that all of the circumstances must be consistent with each other and with the guilt of the defendant, and inconsistent with his innocence; otherwise the accused is entitled to an acquittal.

But that is quite a different thing from saying that a conspiracy may be established by hearsay or incompetent evidence. It is always necessary that the act or declaration of a co-conspirator with which the defendant is sought to be charged must be in furtherance of the alleged object of the conspiracy. Thus

mere narrative or anticipatory declarations of co-conspirators as to the acts which they have done or which they intend to do, are incompetent (See *Spies v. People* [the anarchists' case], 122 Ill. 1, 3 Am. St. Rep. 320, 12 NE 865, 17 NE 898).

“In a case where so wide a range of evidence is permissible, a court should carefully guard against the admission of hearsay evidence.”

People v. Larue, 62 Cal. App. 276, 284, 216 Pac. 627.

We particularly direct in this behalf the attention of the Court to the fact that counsel for the Government have not discussed, attempted to distinguish, or even cited, any of the decisions to which we called attention in appellant's opening brief, and in which hearsay of the character of that admitted in the case at bar was held to be reversible error.

THE APPELLANT PROPERLY OBJECTED TO ALL OF THE HEARSAY EVIDENCE, AND PRESERVED HIS OBJECTION BY MOTIONS TO STRIKE THE SAME FROM THE RECORD.

In view of the statement made at page 12 of the brief of appellee that “the Government is in some doubt as to what particular testimony appellant objects,” we draw the attention of the Court to the specifications of errors set forth at page 42 of the opening brief of appellant, in which we state:

“The trial Court erred in admitting, over the objection of appellant, the hearsay testimony of Milton K. Wu as to his dealings and conversations with the alleged co-conspirator, Wee Zee

Yep, all of which were out of the presence of the appellant whom the witness testified that he never saw at any time prior to his arrest. (TR 61.)

“In this behalf we ask to be relieved of the provisions of Subdivisions (d) of Rule 18 of the Rules of the United States Court of Appeals for the Ninth Circuit; which provides:

“ ‘When the error alleged is as to the admission or rejection of evidence the specification shall quote the grounds urged at the trial for objection and the full substance of the evidence admitted or rejected.’

“We make this request for the reason that full compliance with the provisions of the rule would necessitate the reprinting of all of the testimony of the witness following the objections made by appellant’s counsel at page 38 of the transcript. The full substance of this evidence has been heretofore set forth in the abstract of the case, to which we hereby refer, submitting that the restatement of this evidence should be omitted in the interest of brevity.”

Turning to page 38 of the transcript of the record, we find that, at the very commencement of the testimony of the witness Wu, counsel for the appellant objected to any conversation between the witness and the co-defendant Yep. The United States Attorney then stated:

“It is understood that you have objection to the whole series of transactions.”

Counsel for appellant replied:

“That is right, so I will not interrupt.”

The Court: “The objection is over-ruled.”

It thus appears that it was stipulated by counsel that all of the conversations between the witness and Yep came in subject to objection. We find, however, as we set forth in appellant's opening brief, that counsel for appellant repeatedly renewed these objections. See appellant's opening brief, pp. 8, 10, 14, 17, 21, 25 and 28.

Again at TR 154 (appellant's opening brief p. 36) counsel stated:

"Mr. Riordan. If it please the Court, at this time I would move to strike or exclude the evidence upon the grounds that the Court overruled my objection as to the incompetency, irrelevancy, and immateriality of the evidence that was produced on this stand as to Johnny Ong, and also as to all hearsay statements that were allowed during the course of this hearing, on the grounds that the same were made outside the presence of defendant Ong; that they were matters that were hearsay, that were allowed into evidence without the establishment of the corpus delicti of the conspiracy, being the agreement, and the fact that whatever hearsay statements are allowed in during the course of this trial were not or could not in any way be construed as matters in furtherance of a conspiracy.

"Now, I will eliminate some of the, perhaps, technical objections that I have. Very briefly now, I am going to object to any statements that were made by the agents, any acts or failure to act in relation to statements made by the agents on the part of Johnny Ong at the time of his arrest, and any statements made by his wife. Obviously, those are complete hearsay, Your Honor. In no

way could they be construed as an admission against Mr. Ong or in any way in furtherance of a conspiracy.

“Now, I am going to pass over some technical objections. I will object to those statements at the time of the arrest and after the arrest, on the grounds that the arrest was made after long surveillance, and obviously, as this sale was at 10:15 the previous evening, there was time, in my opinion, to get a warrant for arrest.

“Another objection I have on that ground is that there was lack or reasonable cause to believe that a felony was being committed or had been committed by Johnny Ong.

“Another objection that I will have, Your Honor, is that a search of the house was made to ascertain, you will recall, as to whether or not there was a telephone in the home of Mr. Ong. I object to any search of Mr. Ong’s home, on the ground that no warrant for the search was obtained, they having had plenty of time to obtain the same.

“I also object, Your Honor, to any statements made by Rocky Yep outside the presence of Johnny Ong after Mr. Ong—rather, after Mr. Yep—had been picked up and was in custody; that obviously, even assuming that there had been a conspiracy, it was after the last overt act, and it was at the time of the apprehension and could not, in any way, be construed as a furtherance of a conspiracy.”

We think that it would be difficult to find a case in which the record was better protected than by

learned counsel who appeared for the appellant at the trial.

THE INSUFFICIENCY OF THE EVIDENCE.

The contention of appellant that the evidence was insufficient to justify the judgment of conviction, and that the District Court, therefore, erred in denying the several motions made by counsel for judgments of acquittal, is argued at length, with citation of many authorities, both State and Federal, in appellant's opening brief, pp. 47-54. In addition to the decisions there cited, we call attention to the case of *Boyd v. Superior Court*, 113 Cal. App. 2d 443, 248 Pac. 2d 106, in which the District Court of Appeal of the State of California for the Third District issued a peremptory writ of prohibition to the Superior Court to prohibit the trial of the petitioner who had been held to answer by a magistrate for some four different crimes, including robbery. It is stated that the evidence taken at the preliminary examination, while disclosing an association between the accused and the admitted robbers, and his participations with them in other crimes of like character, failed to connect him with the particular crime, his possession and disposition of the clothing of one robber a few hours after the robbery indicating guilty knowledge, but not participation, and his refusal to answer questions concerning his itinerary not being pertinent where those questions were not accusatory in the sense of accusing him of participation in the crime. It will be noted that the evidence in the case just cited was much stronger than in the

case at bar, but the California Court held it insufficient to even justify holding the accused to answer.

Commending at page 52 of appellant's opening brief, we have summarized all of the evidence, other than the hearsay and, we believe, have demonstrated that it is entirely insufficient to warrant a conviction.

THE AGENT PROVOCATEUR.

To what we said on this subject in the opening brief of appellant, we desire to quote the eloquent language of Presiding Justice Shinn of Division 3 of the District Court of Appeal of the State of California for the Second Appellate District in *People v. Braddock*, 118 A.C.A. 957, 961, 258 Pac. 2d 1043:

“The agent provocateur, so despised that he is given no name in our language, and can claim no place in our society, had best have the door shut against him whenever he appears. Our courts have given no encouragement to his hateful practices, no foothold in our field of law enforcement from which to extend his contaminating influence.”

It matters not that the Supreme Court of California subsequently granted a hearing in the *Braddock* case and affirmed the judgment of the Court below. The learned Presiding Justice of the Court of Appeal followed the language of the great Justices, such as the late Justice Brandeis, whose dissenting opinion in *Casey v. United States*, 276 U.S. 413, 48 S. Ct. 373, 74 L. Ed. 632, in which he says that the Court will not

suffer “a detective made criminal to be punished” has been cited with approval by Chief Justice Hughes in *Sorells v. United States*, 287 U.S. 435, 55 S. Ct. 210, 77 L. Ed. 413, in which the rule is reiterated, with the citation of many earlier authorities.

We likewise submit that it is the sheerest absurdity for the Government to state that one who pleads the defense of the agent provocateur admits his guilt. He obviously is not compelled to plead confession and avoidance. He may deny his guilt but also say that if the evidence produced by the officer who solicited the commission of the crime is to be taken as true, he is nevertheless entitled to a verdict of not guilty. The fact that the so-called “defense of entrapment” was not raised at the trial is likewise immaterial. In *Casey v. United States*, supra, the defense was not raised until the filing of the reply brief and the argument of the cause in this Court.

For the reasons set forth in the dissent of Justice Brandeis, which is now regarded as the law, it matters not that the point was not raised, because the Court will stop the prosecution “in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts.”

**THE PREJUDICIAL ERROR OF THE ADMISSION IN EVIDENCE
OF ACCUSATORY STATEMENTS MADE IN THE PRESENCE
OF APPELLANT.**

This matter is fully briefed in appellant’s opening brief, p. 58 et seq. Whatever may be the rule in Cali-

fornia or in some other jurisdictions, it is the settled rule in the Federal Courts that "when one is under arrest or in custody charged with crime, he is under no duty to make any statement concerning the crime with which he stands charged; and statements tending to implicate him, made in his presence and hearing by others when he is under arrest or in custody, *although not denied by him*, are not admissible against him.

Yep v. United States, 83 Fed. 2d 41;

McCarthy v. United States, 25 Fed. 2d 298.

There is nothing either in *Gentili v. United States*, 22 Fed. 2d 67 or *Rocchia v. United States*, 78 Fed. 2d 966, which is at all inconsistent with this rule.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be reversed and the cause remanded with directions to enter a judgment of acquittal.

Dated, San Francisco, California,
January 18, 1957.

Respectfully submitted,

HERRON & WINN,

By FRED R. WINN,

Attorneys for Appellant.

